IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~382~~ 23

CALVIN TURNER, *et al.*,

Appellants,

—v.—

W. W. FOUCHE, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

PAGE

TABLE OF STATE CONSTITUTIONAL AND STATUTORY PROVISIONS

OTHER AUTHORITIES

IN THE

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TOBER TERM, 1968

No. 842

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ELLANTS' BRIEF

pinion Below

court below is reported at 290 F.
968) and is set forth in the appen-
lier litigation involving several of
as *Turner* v. *Goolsby*, 255 F. Supp.
ipp. opinion, 1966).

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Jurisdiction

This is an action for injunctive and declaratory relief in which jurisdiction of the district court was invoked under 28 U. S. C. §§1331, 1343, 2201-02; 42 U. S. C. §§1981, 1983, 1988, 1994, 2000d and 2000e; and the Fifth, Ninth, Thirteenth, Fourteenth and Fifteenth Amendments. The complaint sought, *inter alia,* to enjoin enforcement and operation of Georgia's constitutional and statutory scheme for the selection of jurors and county boards of education as in violation of the Constitution of the United States. A statutory three-judge court was convened pursuant to 28 U. S. C. §§2281, 2284 (A. 18).

The three-judge court determined that it was properly convened but found "no merit in the three-judge District Court questions presented" (A. 403). A final judgment and decree was entered on September 19, 1968 (A. 406-407). Timely notice of appeal to this Court was filed in the court below on October 14, 1968. On December 2, 1968, Mr. Justice Black extended the time for filing a Jurisdictional Statement to, and including, February 8, 1969. On February 24, 1969, this Court noted probable jurisdiction (A. 408). Jurisdiction of this Court is invoked pursuant to 28 U. S. C. §1253.

Constitutional and Statutory Provisions Involved

This action involves the following Georgia constitutional and statutory Provisions, which are set forth in an appendix *infra* pp. 1a-11a:

Article VIII, Section V, paragraph I, of the Constitution of the State of Georgia of 1945; Ga. Code Ann., §2-6801.

Article VIII, Section V, paragraph II, of the Constitution of the State of Georgia of 1945; Ga. Code Ann., §2-6802.

Ga. Code Ann. §23-802
Ga. Code Ann. §32-901
Ga. Code Ann. §32-902
Ga. Code Ann. §32-902.1
Ga. Code Ann. §32-903
Ga. Code Ann. §32-905
Ga. Code Ann. §32-908
Ga. Code Ann. §32-909
Ga. Code Ann. §32-1101
Ga. Code Ann. §32-1118
Ga. Code Ann. §32-1127
Ga. Code Ann. §59-101
Ga. Code Ann. §59-106
Ga. Code Ann. §59-202
Ga. Code Ann. §59-203
Ga. Code Ann. §59-318
Ga. Code Ann. §59-319

This action also involves the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

Questions Presented

1. Whether statutory standards which govern Georgia jury selection are unconstitutionally vague and permit the arbitrary exclusion of Negroes from jury service in violation of the Fourteenth Amendment to the Constitution of the United States?

2. Whether the Georgia system of selection of school board members by the county grand jury operates to dilute Negro participation in the selection of the board in violation of the Thirteenth, Fourteenth and Fifteenth Amendments?

3. Whether Georgia's prohibition of service on school boards to non-freeholders violates the Fourteenth Amendment?

Statement

A. *Initiation of This Litigation*

On November 14, 1967, Calvin Turner, a registered Negro voter residing in Taliaferro County, Georgia, and his daughter, a student in the public schools of the county, brought this action against members of the county board of education, jury commission, and representative grand jurors. A Negro father of six school age children, who is not a freeholder, was permitted to intervene as a plaintiff (A. 72, 73). The complaint alleged that appellants, and others similarly situated, were denied rights guaranteed by the federal Constitution by the operation of Georgia statutory and constitutional provisions which authorize the selection of school board members and jurors.

Appellants contended, *inter alia,* that: (1) they had been denied an opportunity to serve as jury commissioners, grand jurors, and traverse jurors on account of race (complaint paras. 11(c), 11(d)); (2) they had been denied on account of race an opportunity to participate in the process of selecting the officials who administer the public schools of Taliaferro County (complaint, para. 11(a), (b)); and (3) they had been denied on account of poverty, and the requirement that school board members be freeholders, the opportunity to actually serve as board members (complaint 11(b)) (A. 7-14).

The complaint sought injunctive and declaratory relief as to the offending provisions of state law: Ga. Code Ann. §§2-6801; 32-902, 902.1, 903, 905; 59-101, 106; that membership on the board of education and jury commission be declared vacant; that a receiver be appointed to operate the public schools pending selection of a constitutionally acceptable board; that a special master select members of the grand and petit juries; and that ancillary damages be awarded (A. 16-17). Because appellants sought injunctive relief restraining the enforcement of state statutes and constitutional provisions, a three judge court was empanelled and the State of Georgia permitted to intervene (A. 18, 65).

B. *District Court Proceedings*

The district court held two hearings before it rendered its decision. At the first, January 23, 1968, the court found that the

> evidence indicated and the court announced then and now so finds that Negroes were being systematically excluded from the grand juries through token inclu-

> sion. . . . The grand jury situation was such that Negroes had little chance of appointment to the school board (A. 399).

Counsel for the appellees were directed "to familiarize defendants with the provisions of law relating to the prohibition against systematically excluding Negroes from the jury system" (A. 399). Appellees were also informed by the court that it would be appropriate if two Negroes were appointed to the school board (A. 252).

At the second hearing, February 23, 1968, the court was informed that the county jury list had been revised in light of the court's oral pronouncement that the master list was illegally composed, and that on February 16, 1968, the county grand jury had confirmed one Negro and one white man to fill two school board vacancies (A. 265-69).

On August 5, 1968, the district court entered its opinion, stating the issues as follows:

> The thrust of the complaint is that the Negroes have no voice in school management and affairs in that there are no Negroes on the school board. It is contended that Art. VII [sic], §V, ¶I of the Constitution of the State of Georgia of 1945, Ga. Code Ann. §2-6801, and Ga. Code Ann., §§32-902, 902.1, 903 and 905, all having to do with the election of county school boards by the grand jury, are unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment and under the Thirteenth Amendment, both facially and as applied by reason of the systematic and long continued exclusion of Negroes and non-freeholders as members of the Board of Education of Taliaferro County, Georgia, and on

the selecting grand juries. The same contention is made with respect to the Georgia laws regarding the appointment of and service as jury commissioners. Ga. Code Ann., §§59-101 and 106 (Ga. Laws 1967, p. 251, Vol. 1). Here again unconstitutionality in application is asserted on the basis of systematic exclusion of members of the Negro race from service as jury commissioner. Unconstitutionality is claimed also by reason of the alleged uncertainty, indefiniteness, and vagueness of the standards set forth in each of the statutes (A. 398).

The district court concluded that the grand jury list, "as revised", is not unconstitutional and that state constitutional provisions and statutes governing jury and school board selection are not unconstitutional on their face or as applied: "The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack" (A. 403).

The court also concluded that the requirement that members of the school board be freeholders is not unconstitutional:

> "There was no evidence to indicate that such a qualification resulted in an invidious discrimination against any particular segment of the community, based on race or otherwise" (A. 403).

On September 19, 1968, the court entered a final judgment, in conformance with its opinion, upholding the validity of all the challenged state statutes and constitutional

provisions and denied relief,[2] other than to enjoin jury commissioners from "systematically excluding Negroes from the grand jury system" (A. 406).

C. *Background of This Litigation*

Consideration of appellants' claims requires some familiarity with general characteristics of Taliaferro County and earlier litigation between several of the parties.

According to the 1960 Census county population is:[3]

	Number	*Percent*
White	1,273	37.8
Negro	2,096	62.2
White (over 21)	877	47.3
Negro (over 21)	979	52.7
White (over 18)[4]	917	46.0
Negro (over 18)	1,073	54.0

While the exact number of registered voters of each race in the county was not known it was generally agreed —and the district court found—that Negroes and whites each constituted 50% of those registered (A. 368-69, 390, 399).

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[2] The court declined in its discretion to consider a single-judge claim for ancillary money damages in the amount of $500,000 to compensate plaintiffs for past deprivations and denials of federal rights. A prayer for attorney's fees was denied. Earlier the court had dismissed the complaint as to three defendants named individually as representative grand jurors (A. 71).

[3] 1960 Census of population, Table 25, pp. 12-83, Table 27, pp. 12-130, and Table 28, pp. 12-148.

[4] Of the 910 persons of school age in the county, 15.2% were white males; 13.2% white females; 39.6% non-white males and 32.1% non-white females. *Ibid.*

All of the teachers and children who attend public schools of the county are Negro although the superintendent is white (A. 21, 38-39; 24, 47, 52). The five-man county school board had not had a Negro member in the memory of board members until one was appointed as a consequence of this litigation (A. 23, 46); none of the white board members themselves had children attending the public schools (A. 23, 47, 20, 38). The county jury commission has been composed of whites for at least the last 50 years (A. 20, 38).

In 1965, Negro citizens of Taliaferro County, including appellant Turner, brought an action in the district court against the circuit solicitor, county sheriff, county attorney, superintendent of schools, and county board of education, alleging, in summary, that by misuse of their offices and by lodging unfounded criminal charges they had conspired to deny the rights of county Negroes to free speech and to a desegregated education. A three-judge court was convened and found that a public assembly protesting segregation had "set off a chain of events resulting in a flagrant unconstitutional application of the statute proscribing the disturbance of divine worship." *Turner* v. *Goolsby*, 255 F. Supp. 724, 727 (S. D. Ga. 1965). The court also described the tactics employed by whites to avoid desegregation of the schools:

> There are only two schools in the county; Murden which is populated by Negroes, and Alexander Stephens Institute which was populated by whites during the last school term. It appears without dispute that Alexander Stephens Institute has been closed since the beginning of this school term on or about September 1st, and that all white children in Taliaferro

County are attending school in adjoining counties with most being transported on Taliaferro County school buses. The role that the school superintendent and the school board are alleged to have played in the conspiracy is to have secretly and covertly arranged for all the white children to leave the county for school in other counties so as to eliminate the only white school available to 87 Negro children who sought transfers to a desegregated school. The transfers were sought pursuant to a plan of desegregation filed with the Health, Education and Welfare Department. The transfer applications of these Negro students had never, up until the time of hearing, been considered by the superintendent and the school board. Instead, the school superintendent concluded that some of the applications for transfer were not bona fide and thereupon called upon the school board attorney, defendant Richards, to conduct an investigation as to whether some of the applications were forged . . .

At any rate, Mr. Richards took over the investigation from this point forward. And it must be noted in considering this phase of the case that the form of application for transfer was illegal in the light of several opinions of this court that notarization of the signature of the applicant or of the parents or guardian may not be required [citing cases].

Defendant Richards obtained what he considered to be sufficient evidence to have Plaintiff Calvin Turner, a former teacher in the Negro school of Taliaferro County, indicted for forgery. We view that evidence with considerable scepticism in the light of the illegal transfer applications and other evidence submitted at the hearing . . .

> There was some evidence that the unrest on the part of the Negro plaintiffs stemmed in part from the fact that the superintendent of schools refused their request for a gymnasium or for use of the only school gymnasium in the county which was assigned to the white school. There was some evidence relating to the refusal to rehire several Negro school teachers but this was not developed to the point of showing that this resulted from the alleged conspiracy (255 F. Supp. at 727, 28).

The court determined that the white school superintendent "with at least the knowledge, if not the help, of the school board" (*Id.* at 728) knew that the white schools would be closed. Negroes, however, were not advised. The decision "if not kept secret, was at least not publicized" and "The superintendent arranged during the month of August for her own son to transfer" to a school in another county (*Ibid.*). Although Negro transfer applications had been refused, white applications to attend school in adjoining counties were granted and Taliaferro public school buses used to transport them (*Ibid.*).

In response to these facts, the court placed the school system in receivership and appointed the state superintendent of schools as receiver. He was instructed to submit a plan (i) to end the illegal expenditure of public funds use to transport whites to adjoining county schools and (ii) to grant the right of 87 Negro applicants for transfer to adjoining counties where white children had been transferred (*Id.* at 730). The solicitor, county sheriff and county attorney were enjoined from prosecuting Negroes including appellant Turner under "spurious"

indictments for disturbing divine worship, as well as on perjury and forgery charges. The court also enjoined plaintiffs from disturbing schools and interfering with school buses carrying students to adjoining counties (*Ibid.*).[5] The formerly white school was ultimately reopened as an elementary school and the formerly Negro school as a high school (*Id.* at 731-34), but white children who had left the public schools of the county, rather than attend them on a desegregated basis, never returned. They either attended a newly created private school or continued to attend school in other counties (A. 47-9, 51-2, 354-59, 397).[6]

At this time, Negro parents believed that they could not alter continued operation of a segregated school system, and that the white school board, several of whose present members were also serving in 1965, was hostile to the needs and desires of the students actually attending the public schools (A. 214-217). Repeated attempts by appellant Turner and members of the Voters League, a civic group, to appear at school board meetings were unsuccessful. The time of scheduled meetings was changed without public notice, contrary to law (A. 343-47; *infra* pp. 5a, 6a).[7]

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[5] On May 20, 1966, the court entered a supplementary opinion in which it granted the receiver's motion for discharge after concluding that Negro children who wished to attend school in adjoining counties did so and that adjoining counties had given notice they would take no children, white or Negro, for the school term 1966-67. Administration of the schools was returned to the Taliaferro board of education.

[6] During the 1966-67 term, there were 458 Negro children in the public school system and 72 white children attending a local private school.

[7] At the second hearing, appellees admitted that timely notice of the schedule change had not been published but also alleged, through the introduction of hearsay evidence, that such failure was inadvertent (A. 345-346).

and the time also could not be determined despite attempts to obtain information from the board chairman (A. 188-90, 206-07). When reached by phone his attitude was brusque and unhelpful (A. 210-11). A registered letter sent to him went unanswered (A. 188-89).

One parent, Mrs. Mary Allen, told the district court her experience with the school system. She was invited to visit her child's classroom by the Negro principal. After the white superintendent observed Mrs. Allen in class, the classroom teacher was told by the principal: "Miss Hadden, discontinue this class until the parents (sic) leave" (A. 225). Mrs. Allen subsequently asked to be allowed to organize a parent-teacher association in order to "have some kind of communication with the teacher" (A. 229). The principal of the high school informed her that this could not be done because the superintendent had refused permission (*Ibid.*). When a group of parents attempted to appeal that decision, and present other grievances, the board abruptly adjourned a meeting without responding to any of the complaints. The course of the meeting was described at trial:

> "Judge Bell: How long did you stay in there?
>
> The Witness: About ten minutes.
>
> Judge Bell: And then they moved that meeting be adjourned?
>
> The Witness: That's right, and put the heater out. They had the heater on and a gentleman put the heater out and we walked out. He started putting the lights out too and we walked out and then they closed the door.
>
> Judge Bell: Did they give you an answer at all as to your complaints?

The Witness: No answer.
Judge Bell: No answer?
The Witness: No sir.
Judge Bell: Have you had one since then?
The Witness: No, sir" (A. 233).[8]

Mrs. Allen stated her opinion of the school system as follows:

"You can't even talk with the teacher, and can't go and sit in the classroom and can't talk to the board, can't talk to anybody, nothing about your problems" (A. 234).

Shortly after her experience with the school board she moved to another county for the benefit of her child. Her purpose in moving, she said, was "to get communication" (A. 234).

D. *The Selection of Jurors*

The challenged selection process for the grand jury and school board members begins when a judge of the Superior Court, elected by the voters of a six county circuit,[9] appoints six jury commissioners from among "discreet persons" in the county for a six year term, Ga. Code Ann., §59-101. At least biennially, these commissioners compile from the official registered voter's list used at the last preceding election a jury list of "intelligent and upright citi-

[8] At the first hearing Judge Bell stated: " . . . The court construes that paragraph of the petition to mean, based on the evidence, that the First Amendment has been suspended in Taliaferro County to the extent that citizens can't assemble before their officials and petition for their grievances. That's been the evidence" (A. 214-215).

[9] Ga. Code Ann. §24-2501.

zens of the county." Ga. Code Ann., §59-106.[10] While Georgia law permits 18 year olds to vote only persons over 21 are eligible for jury service, Ga. Code Ann., §59-201.

After compiling the jury list the commissioners select a "sufficient" number of the most "experienced, intelligent and upright citizens",[11] not exceeding two fifths of the whole, to serve as grand jurors.[12] The judge of the Superior Court draws from the grand jury list so selected not less than 18 nor more than 36 names to serve on a venire for the next term of court, and the sheriff summons the prospective jurors, Ga. Code Ann., §§59-203, 206. After excusals, a grand jury panel consisting of not less than 18 nor more than 23 persons is drawn from the venire (A. 311-314, 322), Ga. Code Ann., §59-202.[13]

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[10] §106 also provides that: "If at any time it appears to the jury commissioners that the jury list so composed, is not a fairly representative cross-section of the intelligent and upright citizens of the county, they shall supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly represented thereon."

[11] Prior to 1967, the commissioners were instructed to select as jurors upright and intelligent persons from the books of the Tax Receiver. Ga. Code Ann., §59-106 (superseded). The tax books from which the prospective jurors were selected were segregated by race. Ga. Code Ann. §92-6307. See *Whitus* v. *Georgia*, 385 U. S. 546, 549 (1967).

[12] The requirement that Grand Jurors be the most "experienced, intelligent and upright citizens" was added to the statute in 1968 subsequent to trial in this case.

[13] Under Georgia law grand juries have a number of powers in addition to indictment and appointment of school board members. They may recommend that individual tax returns be corrected, Ga. Code Ann. §59-306; inspect the list of voters, Ga. Code Ann. §59-308 and the offices, papers, books and records of the

At the January 23, 1968 hearing evidence was introduced showing that on the jury list most recently composed, 56 out of a total of 328 traverse jurors (or 17%) were Negro (A. 182-83, 399), and 11 out of 130 on the grand jury list (or 8.5%) were Negro (*ibid.*). The district court concluded that systematic exclusion of Negroes was taking place and condemned the practice:

> "We all know what systematic exclusion is, and when there is as many registered Negro voters in a county as whites and you have 130 to 11 on the grand jury, why that's systematic exclusion, and that will have to be corrected" (A. 251).

The court adjourned the hearing after informing defendants of the court's power to enjoin racial discrimination if a remedy were not devised (A. 251, 254-255, 399).

At the beginning of the February 23, 1968 hearing appellees' counsel presented a report to the district court which stated that on January 26, 1968, the judge of the Superior Court ordered the jury commissioners to revise

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clerk of the Superior Court, the ordinary and the county treasurer or depository for conformance with their duties, Ga. Code Ann. §59-309. The jury may appoint citizens to inspect the affairs of the ordinary or other authority having charge of county affairs, the clerk of the Superior Court, county treasurer, tax collector, school superintendent, sheriff, and all other county offices, Ga. Code Ann. §59-310. Persons appointed by the grand jury to inspect have full power to take control of the various offices, to compel the attendance of witnesses, and hear evidence of fraud and the non-performance of official duty, Ga. Code Ann. §59-311. The jury is also obliged to inspect the sanitary conditions of jails and to make recommendations as to their proper operation, Ga. Code Ann. §59-314; to inspect all public buildings and property of the county and report their condition, Ga. Code Ann. §59-315; and to appoint a committee to inspect every orphanage, sanitorium, hospital, asylum, and similar facilities for the purpose of ascertaining what persons are confined and by what authority, Ga. Code Ann. §59-401.

both the grand and traverse jury lists "to comply with the oral pronouncement" of the district court (A. 266). This order was filed with the clerk of the Superior Court but not generally publicized. By word of mouth, however, some persons did hear of it and requested not to be put on the jury list (A. 280-81). Over forty whites but only two or three Negroes were not placed on the list as a result of such requests not to serve (A. 89, 402). Appellants' counsel objected to the report on the ground that it was hearsay and that neither he nor appellants had been informed of the revision or furnished with the report in advance of the hearing but the district court received it in evidence (A. 269-72; cf. 262).

According to the report the commissioners considered "each and every name" (A. 77, 266, 67), on a list of 2,152 registered voters. When they were not familiar with Negroes, they inquired of three Negroes who were "brought in to work with us in order to assist in excluding people from the list" (A. 275, 76). They consisted of an insurance agent, his daughter-in-law and a person who was employed by the board of education but whose position the chairman did not know. These Negroes were not, however, appointed jury commissioners (*Ibid*).

The Commission eliminated the following numbers of persons from the voters list for the reasons stated:

Poor health and over-age	374
Under 21 years of age	79
Dead	93
Persons who maintained Taliaferro County as a permanent place of residence but were most of the time away from the county	514

Persons who requested to be eliminated from consideration	48
Persons about whom information could not be obtained	225
Persons of both the white and Negro race who were rejected by the Jury Commissioners as not conforming to the statutory qualifications for juries either because of their being unintelligent or because of their not being upright citizens	178
Names on voters lists more than once	33
Total	1,544

(A. 77-78, 267).

These disqualifications left 608 names on the list. The commissioners determined that fewer than 608 names were needed, alphabetized the remaining names, and discarded every other one. Of the 304 persons on the list, 113 (37%) were Negro and 191 (63%) were white (A. 78, 267). From the 304 they drew 121 names by lot and put those names on the grand jury list (A. 78, 268). Forty-four (36%) of 121 persons on this list were Negroes (A. 79, 268). Of 32 persons initially drawn from this list for the grand jury, 9 (or 28%) were Negro. Of the 23 persons actually selected to serve on the grand jury, 6 (or 26%) were Negro (A. 79, 268-69).[14]

[14] The judge begins with the first name on the list of 32 and hears requests for excuses. After persons granted excuses are eliminated, he chooses the first 23 names on the list (A. 322).

Two months after the February 23, 1968 hearing, the jury commissioners reported additional information concerning the revision to the district court and corrected errors in earlier figures furnished. They found that 2,252 names, instead of 2,152, were on the voters list and that eliminations were made for the following reasons:

Category	*Total Number of Names*	*Negro Names*
Under 21	81	71
Dead	94	Unknown
Requested	43	2
No Information	226	Unknown
Poor health and/or old age	482	191
Away	533	263
Miscellaneous	179	167
Elected Officials and then Known Duplications	8	–0–
Not Alternately Selected	302	106

(A. 89).

The district court only partially accepted the fact stated in this report. The court found that 171 of the 178 persons excluded by reason of character and intelligence (as opposed to 167 of 179) were Negro and that 3 of 43 persons excluded by request (as opposed to 2 of 43) were Negro (A. 402; cf. 89).

The commission chairman testified concerning the revision. When asked what was meant by the standard of "intelligent," the chairman first stated it would be someone capable of interpreting proceedings in the courtroom but then that the standard used was whether persons could

read or write (A. 283). He later testified: " . . . we made the overall consideration of uprightness in people who were dependent and reliable and honest. We did not say pick out so and so and say they were unintelligent" (A. 284). He also testified that an "upright" citizen was one who had a "good reputation, people who were honest and of good character" (A. 284). While some persons were omitted from the list because they had a criminal record the Chairman had no idea of the number or the offenses which constituted grounds for exclusion (A. 285). For example, he did not know whether any persons were found to lack a sufficiently upright character because of having been convicted of a traffic violation (A. 287).

E. *Selection and Duties of School Board Members*

Under Georgia law, the county grand jury selects as school board members five freeholders "of good moral character, who shall have at least a fair knowledge of the elementary branches of an English education and be favorable to the common school system", Ga. Code Ann. §§32-902.1, 903. The operation of this system is statewide, except in those counties altering it "by local or special law conditioned upon approval by a majority of the qualified voters of the county voting in a referendum thereon," Ga. Code Ann. §2-6802. Approximately 94 of Georgia's school boards are chosen by county grand jury, *Atlanta Journal*, p. 7-A (Feb. 2, 1969). Each member is elected for a four year term, Ga. Code Ann. §2-6801; §32-902, but the board files vacancies, other than which result from expiration of a term, until the next grand jury meeting, at which a successor is chosen, Ga. Code Ann. §2-6801.

The board is required to meet between the 1st and the 15th of each month at the county seat for the transaction of business pertaining to the public schools. Ga. Code Ann. §32-908 provides that the board "shall annually determine the date of the meeting" and shall "publish same in the official organ for two consecutive weeks following the setting of said date; Provided further that said date shall not be changed oftener than once in twelve months."

The Georgia grand jury selection method is unusual. A 1949 study concluded that the prevailing method of selection in the United States is by public vote. While several states where the county is the basic unit of government, have appointive boards (by the Governor in Maryland; the General Assembly in North Carolina; School Trustee Electoral Boards in Virginia; and County Courts in some counties in Tennessee) Georgia was apparently the only state where appointment was by the grand jury. *The Forty-Eight State School Systems* (Council of State Governments, 1949), pg. 59, Table 23, p. 196. A more recent survey of 477 school boards of various sizes and locations revealed that 82.2% were elected. See Circular No. 6, Nov. 1967, Educational Research Service (Washington, D. C.).

At the January 23, 1968 hearing in the district court the presiding judge remarked that the absence of Negroes on the board of education "simply will not do" and stated pointedly that it would be wise if the school board filled its vacancies with "two outstanding Negroes . . . if you don't want to do that we will know that on the 23rd [of February]" (A. 252). Two vacancies existed on the school board at the time of the hearing. The superintendent of schools attended the hearing and upon her return informed the school board of the presiding judge's remarks (A. 350,

351).[15] Two days later, the county board of education met and appointed one Negro and one white to the board. Shortly thereafter these choices were ratified by the grand jury (A. 268, 339)—apparently without the public notice required by law (A. 348-349, 351). No Negroes attended the meeting at which the Negro board member was selected although Negroes had attended board meetings in the past (A. 347-348). Nor did the board discuss the qualifications of Casper Evans, the new Negro member, for board membership (A. 351-52). He was "put in nomination and elected" (A. 353). No effort was made to give notice of the appointment meeting to any parent or the plaintiffs in this suit (A. 348, 353).

Appellant Turner testified that Mr. Evans was a distant relative of his who was about 71 or 72 years of age and retired (A. 374). Mr. Evans had only attended school to the third or fourth grade (A. 375) and had often stated that he did not feel like going out in public any more or to attend community meetings, because of his age (A. 374-75). Turner believed that Evans was unrepresentative of the Negro community (A. 381, 385), and that if Negroes had been afforded an opportunity to choose, they would have selected someone far more qualified educationally, and otherwise, to serve (A. 385).[16]

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[15] When the superintendent was asked what efforts she had made to keep the public school system from becoming all Negro she replied that "the schools are open to all the children of Taliaferro County" (A. 355-56).

[16] He stated: "Mr. Casper Evans was taken from the lower bracket, the very lowest bracket of those persons who have attained a education" (A. 387). "I submit, said Mr. Turner, the people in that community . . . knew nothing about the election of Mr. Evans, and . . . this certainly wouldn't be the democratic process" (A. 381).

Summary of Argument

I.

Georgia confers an opportunity for arbitrary and discriminatory jury selection on jury commissioners by authorizing them to exclude persons they do not believe are "intelligent and upright" citizens. Neither Ga. Code Ann. §59-106, nor the practice of the all-white Taliaferro County commission, supplies a meaningful definition of the statutory language. Vague standards have often been condemned in other spheres of governmental activity precisely because of their tendency to vest this sort of undue discretion in officials to deprive citizens of their constitutional rights. Requirements of specificity are at least as necessary to a juror selection system, for although blatant acts of discriminatory exclusion may be prevented by injunction, the more subtle forms of the evil, such as discriminatory limitations of the number of Negro jurors, will survive as long as Negroes can be declared ineligible on the basis of subjective and intangible character judgments. (In this case the opportunity to discriminate was employed by exclusion of 171 Negroes and only 7 whites as not being "intelligent and upright".) The necessity of striking Georgia's vague selection standards for grand jurors is heightened by the fact that the grand jury selects members of the county school board—a circumstance which has resulted in the exclusion of Negroes from board membership in a county where all the public school children are Negro.

II.

Georgia law authorizes a multi-layered scheme of selection of school board members which has resulted in the virtual exclusion of Negroes from board membership. Limitations on the right of Negroes to participate in the selection of officials "who control the local county matters that intimately touch [their] lives," *Terry* v. *Adams*, 345 U. S. 461, 470 (1953), violate the Constitution. When such limitations dilute the weight of Negro votes they may be redressed according to the standards of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), but other remedies, reflecting the special need of Negroes to unimpaired political rights, may also be employed. In Taliaferro County, dilution of the power of Negroes to elect school board members has resulted in a segregated school system and in making the Negroes virtually subject to the commands of the whites in regard to the education of their children. The district court erred by not declaring a school board selection system which so operates unconstitutional and by failing to consider relief which would eliminate diminution of Negro voting power for school board members.

III.

Georgia's constitutional and statutory requirement that county school board members must be freeholders violates the Equal Protection Clause of the Fourteenth Amendment for it discriminates against the poor and landless far more than the poll tax condemned in *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). The freeholder restriction reflects an obsolete view of the attributes of real

property ownership, it bears no reasonable relationship to any legitimate governmental objective, and it retards citizen participation in what may be the most important unit of local government. While the mischief caused by such a prohibition is plain, Georgia has not suggested any "compelling interest" in the prohibition of non-freeholders from board membership which would begin to meet the exacting standards of equal protection applied when the right to vote is involved.

ARGUMENT

I.

Statutory Standards Which Govern Georgia Jury Selection Are Unconstitutionally Vague and Permit Exclusion of Negroes From Jury Service in Violation of the Fourteenth Amendment to the Constitution of the United States.

In *Whitus* v. *Georgia*, 385 U. S. 545, 552 (1967) this Court condemned Georgia statutes which injected race into the selection of jurymen because they provided an "opportunity to discriminate," see also *Sims* v. *Georgia*, 389 U. S. 404 (1967); *Cobb* v. *Georgia*, 389 U. S. 12 (1967); *Jones* v. *Georgia*, 389 U. S. 24 (1967); *Anderson* v. *Georgia*, 390 U. S. 206 (1968); *Sullivan* v. *Georgia*, 390 U. S. 410 (1968); *Bostick* v. *South Carolina*, 386 U. S. 479 (1967). In 1967, the Georgia legislature changed the source of prospective jurors from racially designated tax digests to voter lists, but retained the "opportunity to discriminate" condemned in *Whitus*, *supra*, by reenacting the vague and subjective character "standards" of juror eligibility challenged here

that all jurors be "intelligent and upright".[17] In addition, the "opportunity" for racial selection inherent in this statutory language was "resorted to" (385 U. S. at 552) by Taliaferro County jury commissioners, both before and after this litigation commenced, a circumstance entitled to considerable weight in considering the constitutionality of the challenged statutory scheme, *Louisiana* v. *United States,* 380 U. S. 145 (1965); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Hague* v. *C. I. O.,* 307 U. S. 496 (1939); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886). Although the number of white and Negro voters in the county is equal, until suit was filed only 11 of the 130 persons on the grand jury list were Negro (A. 399) and during the court-ordered revision of the jury list, approximately 96% (171 out of 178) of the persons disqualified by the commissioners as not "intelligent and upright citizens" were Negro (A. 402). It is apparent that the vagueness of the challenged provisions at the very least serves as a convenient mask for what is plainly racial discrimination.

Georgia law creates several levels in the jury selection process at which virtually unlimited discretion is delegated to persons possessing appointive powers. First, the judge of the Superior Court, an official elected by the voters of six counties, is authorized to appoint as county jury commissioners anyone he deems to be "discreet", Ga. Code Ann. §59-101. Although Negroes constitute a majority of the county population, all the "discreet" persons selected by Superior Court judges to be jury commission-

[17] In 1968, the Legislature amended Ga. Code Ann. §59-106 to require that grand jurors be "the most experienced, intelligent and upright citizens" of those chosen as jurors.

ers over the years have been white. Second, the discretion of the jury commissioners is such that they may disqualify from service as jurors anyone they find not to be an "intelligent and upright citizen" and anyone for grand jury service who is not among "the most experienced, intelligent and upright", Ga. Code Ann., §59-106. Section 106 also provides that if at any time *"it appears to the jury commissioners"* that the jury list is not a fairly representative cross-section of the *"intelligent and upright* citizens" of the county, they shall supplement the list by "going out into the county and personally acquainting themselves with other citizens of the county, *including intelligent and upright* citizens of any significantly identifiable group in the county which may not be fairly represented thereon." (Emphasis supplied.) Thus the statute first provides the jury commissioners with "the opportunity to discriminate"; then charges the very same persons with the power to determine by use of the same subjective standard whether in fact the opportunity "was resorted to" (*Whitus, supra,* 385 U. S. 552) and should be remedied.[18]

The Taliaferro jury commissioners concede that eligibility under §106 is determined by their "personal" opinion. When asked to "describe in full and complete detail the standards applied" the commissioners responded by denying the existence of uniform criteria defining "intelligent and upright":

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[18] The language of Ga. Code Ann. §59-106 instructing the jury commissioners to find additional jurors from readily identifiable groups is less of a *caveat* than a camouflage. As long as "intelligent and upright" remains a part of the jury selection statute, the jury commissioners will have a built-in excuse for failing to include Negro citizens on the juries.

> We did not detail or fix any standards in making a determination as to who is upright and intelligent. As previously stated, this determination is based upon our knowledge either personal or through investigation of these persons being considered (A. 36).

When asked to state "in full and complete detail, the procedures followed in selecting persons for the grand jury list" the commissioners stated that there "was no set procedure for this selection process":

> From the official registered voters list which was used in the last preceding general election, as a group we selected a fairly representative cross-section of the upright and intelligent citizens of the county. There was no set procedure for this selection process. We did it as a group (A. 36).

The manner in which the commissioners confronted their constitutional and statutory duty to select a cross-section of the community is illustrated by the fact that until after the court-ordered revision of the illegal jury lists the commissioners professed total ignorance as to whether discernible groups in the community were represented:

> Q. 6. How many members of the present grand jury list are members of the Negro race? A. 6. We do not know.
>
> Q. 7. How many members of the present grand jury list are white females? A. 7. We do not know.
>
> Q. 8. How many members of the present grand jury list are Negro females? A. 8. We do not know.

* * * * *

Q. 17. Of the names on the voter's list, how many are Negroes? A. 17. We do not know.

Q. 18. Of the names on the voter's list, how many are white females? A. 18. We do not know.

Q. 19. Of the names on the voter's list, how many are Negro females? A. We do not know (A. 30-32, 36, 37).

Even after the revision process was completed, the commission had not formulated standards of selection to make the vague language of §106 more precise. The chairman testified, for example, that an "upright citizen" was one who had a "good reputation in the community, good character" (A. 284). As to the term "intelligent", he presented totally inconsistent definitions. First, he defined the intelligent as:

> People who we thought would be capable of interpreting proceedings that would be going on in the courtroom (A. 283).

But we asked "what standards did you use," he replied:

> People that could not read nor write to our knowledge. I don't think we rejected anyone because you say they are unintelligent. I mean that—
>
> Judge Bell: You said awhile ago being able to understand proceedings in court.
>
> The Witness: Yes sir, and we made the overall consideration of uprightness and people who were dependent and reliable and honest. We did not say pick out so and so and say they were unintelligent.
>
> Judge Bell: In other words, you measured these people by the standard as to whether or not they were

capable of serving on a jury and understand what the duty of a juror was?

The Witness: That's right, sir (A. 284).

This jury selection scheme—as authorized by Georgia law and employed by the Taliaferro County Commissioners—violates appellants' rights under the Fourteenth Amendment. *First.* As is true with racial discrimination in voting[19] (an analogy especially pertinent here in light of the dual role of the grand jury system see *supra* p. 20), excessive discretion in the hands of local officials thwarts nonracial selection of prospective jurors. Judge Kaufman merely summarized what is generally recognized when he told a United States Senate Committee that:

> "... long experience with subjective requirements such as 'intelligence' and 'common sense' has demonstrated beyond doubt that these vague terms provide a fertile ground for discrimination and arbitrariness, even when the jury officials act in good faith." [20]

One study of jury selection procedures has concluded that until character tests are replaced by objective standards non-racial selection is unlikely: "It is this broad discretion located in a non-judicial officer which provides the source of discrimination in the selection of juries." The Congress,

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[19] Condemnation of discretion in the hands of state voting officials is the heart of recent decisions of the Court. See *United States* v. *Mississippi*, 380 U. S. 128 (1965); *Louisiana* v. *United States*, 380 U. S. 145 (1965).

[20] Statement of Hon. Irving R. Kaufman, *Hearings on S. 1318 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. at 251 (1967). See also Kuhn, "Jury Discrimination: The Next Phase," 41 U. S. C. Law Rev. 235, 266-82 (1968).

The Court and Jury Selection, 52 Va. L. Rev., 1069, 1078 (1966); see also *Rabinowitz* v. *United States*, 366 F. 2d 34 (5th Cir. en banc 1966).[21]

Second. While character tests such as those contained in §106 provide a ready opportunity for racial selection, their "indefiniteness . . . makes it most difficult to prove that rejection of an eligible juror was the product not of honest opinion but of racial policy" Kuhn, op. cit. p. 271. Opinions of uprightness and intelligence primarily depend on the individual making the judgment. Thus, a commission bent on racial discrimination may do so without check as long as it is satisfied with limiting the number of Negroes serving rather than excluding them totally.

Third. Even the fair minded commissioner is likely to be misled by the shifting and subjective [illegible] of character standards into racial or other arbitrary selection. The Fourth Circuit made this point forcefully when considering a Virginia statutory scheme similar to that involved in this case:

> It should not surprise anyone that an all-white jury commission guided by a white judge would be unlikely to find as high proportion of the Negro community to be "best qualified" as found among white people. It is a simple truth of human nature that we usually find the "best" people in our own image, including,

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[21] In recognition of the dangers of subjective selection standards, Congress passed the 1968 Jury Selection and Service Act, Pub. L. No. 90-273, 28 U. S. C. §§1861 et seq., abandoning the "key man" system in favor of "random selections" and "objective criteria only" in determining juror qualifications. See House Report, No. 1076, Feb. 6, 1968 (to accompany S. 989) set out in U. S. Code Congressional and Administrative News, 90th Cong. 2nd Sess. pp. 748-63.

unfortunately, our own pigmentation. But the danger is not simply subjective. As a practical matter, in a society that is still largely segregated, at least socially, it is obviously true that white people do not generally have the wide acquaintance among Negroes that they have among other white people. A failure of either the judge or the commissioners fully to acquaint themselves with all those eligible for jury duty can just as effectively result in racial discrimination as would conscious and deliberate invidious selection. Indeed, within the meaning of the Equal Protection Clause, such a failure has been equated with deliberate and purposeful discrimination. *Hill* v. *Texas*, 316 U. S. 400, 404 (1942).

Achievement of the stated purpose of the judge and the jury commissioners to get only the "best qualified people" was not aided by the existence of any objective standard that might have been readily applied. The only direction given by the legislature to the judge in that regard is that he select from the citizens of each county "persons 21 years of age and upwards, of honesty, intelligence and good demeanor and suitable in all respects to serve as grand jurors • • •" These are qualities hard to judge. The standards applied by the jury commissioners were, according to the oath subscribed by them, no more definite: "We will select none but persons whom we believe to be of good repute for intelligence and honesty" Standards such as these afford but little guidance to the conscientious judge and jury commissioner. It is not unnatural that each may be left with the feeling that he has discharged his duty when he has subjectively selected the "best folks" known to him.

> Selection of jurors "must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. (*Witcher* v. *Peyton*, 405 F. 2d 725, 727 (4th Cir., 1969)

Finally, there is an evil inherent in vague character and intelligence eligibility standards which is no less significant for it being difficult to prove in any particular case. It is that "commissioners can easily select only those Negroes who behave as Negroes are meant to behave in their contacts with white society—Negroes who 'know their place.' Indeed, it is only natural for southern jury officials to find lacking in 'judgment' and 'character' those Negroes who engage in civil rights activities, who 'talk back' to white employers, or who have hung juries in previous cases with racial significance. The usual statutory criteria readily lend themselves to selection only of 'safe' Negroes who will do what is expected of them in the jury room. The jury commissioners may consciously exclude all but 'Uncle Toms,' or they may in good faith simply regard other

Negroes as lacking in the qualities required of good jurors." (Kuhn, op. cit. at p. 271).

It is settled, however, that officials may not be empowered to dispense or deny important constitutional rights in the exercise of a discretion which consists solely of their own judgment, unguided by statutory or other guidelines. In other spheres of governmental activity this Court has declared similar language permitting public officials to make subjective decisions unconstitutional.[22] Dealing with voting qualifications imposed by South Carolina law, similar to those involved here for jury service, this Court declared in *South Carolina* v. *Katzenbach*, 383 U. S. 301, 312-13 (1966):

> "... the good morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials."

Requirements of specificity are at least as necessary in a selection system for jurors. "[E]xclusion from jury

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[22] "Unreasonable charges" *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921); "unreasonable profits" *Cline* v. *Frink Dairy Co.*, 274 U. S. 445 (1927); "reasonable time" *Herndon* v. *Lowry*, 301 U. S. 242 (1937); "sacrilegious" *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952); "so massed as to become vehicles for excitement" (a limiting interpretation of "indecent or obscene") *Winters* v. *New York*, 333 U. S. 507 (1948); "immoral" *Commercial Pictures Corp.* v. *Regents of University of New York* reported with *Superior Films, Inc.* v. *Department of Education*, 364 U. S. 587 (1954); "an act likely to produce violence" in *Edwards* v. *South Carolina*, 373 U. S. 229 (1963); "subversive person" in *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); "reprehensive in some respect"; "improper"; and outrageous to "morality and justice" *Giaccio* v. *Pennsylvania*, 383 U. S. 339 (1966). See also *Staub* v. *City of Baxley*, 355 U. S. 313 (1958); *Louisiana* v. *United States*, 380 U. S. 145, 153 (1965); *United States* v. *Atkins*, 323 F. 2d 733, 742-743 (5th Cir. 1963); *Davis* v. *Schnell*, 81 F. Supp. 872 (S. D. Ala.) *aff'd per curiam*, 336 U. S. 933 (1949); *Board of Supervisors* v. *Ludley*, 252 F. 2d 373, 74 (5th Cir. 1958).

service . . . is at war with our basic concepts of a democratic society and a representative government". *Smith* v. *Texas,* 311 U. S. 128, 130 (1940). And when, in addition, the electoral function of the Georgia grand jury is considered (see *supra* p. 20), the denial of Fourteenth Amendment rights by conferral of excessive discretion in the jury commissioners is plain. There is simply no reason for the State of Georgia to require that grand jurors who may vote in its school board elections be "intelligent and upright" when persons who vote in general elections must meet no such standard. The school board "voter registrars", who in Georgia happen to be jury commissioners, have "virtually uncontrolled discretion as to who should vote and who should not." *Louisiana* v. *United States,* 380 U. S. 145, 150 (1965). In that case, this Court sustained a lower court decision holding the state's voter qualification test, which required the prospective voter to interpret portions of the Louisiana or United States Constitutions, invalid *on its face* and as applied, under the Fourteenth and Fifteenth Amendments. Basic to the Court's holding was the fact that the test "imposed no definite and objective standards" upon the registrars who were charged with administering it. (380 U. S. at 152)

Appellants do not contend that the state can set no standards at all as qualifications for jurors (or school board electors) but qualifications that the state sets must be compatible with federal constitutional requirements. As the record in this case amply demonstrates, there is no question but that the present indefinite and non-objective standards permit an extraordinary denial of equal protection: in a county where Negroes are more than 60 percent of the population and 50 percent of the

voters, they make up a disproportionate minority of grand jurors. By manipulation of the standardless and unreviewable discretion which Georgia has delegated to jury commissioners, Negroes have been rendered a minority of the school board electors as surely as though they had been gerrymandered out of the county. *Cf. Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

General injunctions against racial exclusion such as granted by the district court may be sufficient to prevent blatant acts of discrimination such as existed prior to institution of this litigation, but subtler forms will survive as long as tools such as character tests which measure intangibles remain readily available. At the first hearing in this case, the district court, in effect, ordered recomposition of the county jury lists on a non-discriminatory basis. While the result was an increase in the absolute number of Negroes selected, an overwhelming proportion (about 96%) of those excluded by the all-white commissioners during the revision as not "intelligent and upright citizens" were Negro. Thus, under the existing statutory scheme it may well be possible to eliminate near total exclusion, but not the racial *limitation* of Negroes from the jury rolls. It is not, however, only exclusion but limitation on the basis of race as well which the Constitution prohibits: "Discriminations against a race by barring or limiting citizens of that race from participation in jury service are odious to our thought and our Constitution" (emphasis added).[23] *Brown* v. *Allen*, 344 U. S.

[23] That an unconstitutional *limitation* of Negroes has taken place in Taliaferro County is shown by the fact that in compiling a new list of jurors, the jury commissioners had 304 names (113 Negroes or 37%; 191 whites or 63%) remaining after randomly discarding half the registered voters not disqualified. One of the

433, 470-471 (1953) citing *Brunson* v. *North Carolina*, 333 U. S. 851 (1948); *Cassell* v. *Texas*, 339 U. S. 282, 286, 287 (1950).

It may well be that Taliaferro jury commissioners truly believe that of all the registered voters who are by reason of faulty intelligence or character ineligible to serve as jurors, 96% are Negroes. They cannot be enjoined from that *belief*. It *is* possible, however, for them to be prohibited from bringing such opinions, similar to those branded a "violent presumption" in *Neal* v. *Delaware*, 103 U. S. 370, 397 (1881), to bear upon decisions as to who should be selected as jurors. As was true in *Louisiana* v. *United States*, "the vice cannot be cured by an injunction enjoining its unfair application" 380 U. S. 145, 150 n. 9 (1965), but only by prohibiting the use of a vague and subjective standard.

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statutory standards of disqualification, the character and intelligence test, in effect, operated to exclude Negroes only: the district court found that of the 178 persons excluded, 171 were Negro. Thus prior to application of the character test there was approximately a 50-50 percentage breakdown reflected on the lists if we assume that the random number discarded merely halved the numbers of the whites and Negroes of the initial list. As of all those disqualified by the test, 96% were Negro, the result of the test's application was to reduce the Negro representation of the revised list from approximately 50% (the proportion of Negro voters) to 37%.

II.

Georgia Constitutional and Statutory Provisions for Selection of School Board Members Operate in Taliaferro County to Dilute Negro Participation in the Selection of Board Members in Violation of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States.

Although Negroes constitute about 60% of the residents and 50% of the registered voters in Taliaferro County, they long have been virtually excluded from jury service. Even after the district court found a blatant and long-standing disregard of Negroes' constitutional rights, the revised jury list contained disproportionately few Negroes:

113 Negroes	37%
191 Whites	63%

The new grand jury chosen from this list contained even fewer:

6 Negroes	26%
17 Whites	74%

Because the grand jury selects the county school board, Negroes have been consistently excluded from board membership despite the fact that, since 1965, the public schools have been attended and staffed solely by Negroes, whites having sent their children to private school or to public schools in other counties to avoid desegregation. And while the first Negro was selected to fill a vacancy on the five member board before the second hearing in this case,

this was done only after the district court strongly implied that the court would act if Negro exclusion from the board continued.

Appellants contend in Argument I, *supra*, that the jury list, as revised, violates the Fourteenth Amendment because it was compiled pursuant to unconstitutionally vague statutory provisions which provide an undue opportunity to discriminate on the basis of race. Independent of appellants' contentions in this respect, however, the use of the grand jury to select school board members in Taliaferro County violates the Thirteenth, Fourteenth and Fifteenth Amendments because Georgia has adopted a method of selection which operates to dilute the political influence of Negro citizens. Even if equality of representation is not required in selecting jurors who have no political function, stricter standards apply here for two reasons: (1) "the theme of the Constitution is equality among citizens in the exercise of their political rights"[24] and the Georgia grand jury exercises political power by reason of its selection of school board members; and (2) The Thirteenth, Fourteenth and Fifteenth Amendments were intended to prohibit diminution of the voting power of Negroes, the very turning of "Negro majorities into minorities" *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M. D. Ala. 1965) which has occurred here.

That the system of selection of board members involved does not provide for direct election does not diminish the rights of Negroes to be afforded full and equal participation in it. *Sailors* v. *Board of Education of Kent County*,

[24] *MacDougall* v. *Green*, 335 U. S. 281, 290 (1948) (Mr. Justice Douglas dissenting) cited with approval in *Reynolds* v. *Sims*, 377 U. S. 533, 564 n. 41 (1964).

387 U. S. 105 (1967) illustrates the principle that the right of states to regulate their political subdivisions may not validate racial discrimination. There selection of school officials was held not subject to "one man, one vote" requirements, the latter being subordinate to the right of states to use appointive, non-representative, methods for choosing administrative officials. But this Court was careful to distinguish racial discrimination in the political process from the *Sailors* holding (387 U. S. at 108-109):

> A State cannot, of course, manipulate its political subdivisions so as to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race. [footnote omitted] *Gomillion* v. *Lightfoot,* 364 U. S. 339, 345.

Certainly this exception to the *Sailors* rule prohibits state action to dilute the influence of Negroes in the class of citizens choosing, appointing *or* electing members of a political body.[25] *Cf. Hadnott* v. *Amos,* —— U. S. ——, 37 U. S. L. Week 4256 (March 25, 1969).

Unconstitutional dilution of the Negro vote in Taliaferro County is established under the standards of *Reynolds* v.

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[25] It can hardly be argued that the policy of the Thirteenth, Fourteenth, and Fifteenth Amendments contemplates permissible exclusions of Negroes from a political process merely because the particular form of selection involved is not a general election. The primary purpose of those Amendments, recognized in numerous decisions of this Court, see *Shelley* v. *Kraemer,* 334 U. S. 1, 23 (1948) and cases cited in footnote 30; *Nixon* v. *Herndon,* 273 U. S. 536, 540-41 (1927) is to undo the effects of slavery upon the civil rights of the Negro race. That purpose is subverted by permitting exclusion of Negroes from *any* political process, whether or not a regular election.

Sims, 377 U. S. 533 (1964).[26] For years, Negroes have accounted for virtually none of the electorate of grand jurors, and they accounted for only 26% of the most recent jury.[27] In *Reynolds,* 25.1% of the population could elect 50% of the state senate, and 25.7% could elect half the state house of representatives (377 U. S. at 545). Here whites, with 50% of the voters have 74% of the electoral strength, almost the same percentage gap as in *Reynolds.* In *Davis* v. *Mann,* 377 U. S. 678, 688-89 (1964), the disparity between population and voting strength was less than 10% with regard to both houses of the state legislature. In *WMCA* v. *Lomenzo,* 377 U. S. 633, 647 (1964) the disparity was 16.3% with regard to one house and 8.2% as to the other.

But neither the rights asserted, nor the remedies to which appellants are entitled, need rest on *Reynolds* v. *Sims, supra,* and *Baker* v. *Carr,* 369 U. S. 186 (1962).[28]

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[26] Vote dilutions also appear to be prohibited under §2 of the Voting Rights Act of 1965 which bans any "practice or procedure . . . imposed . . . by any State or political subdivision to deny or *abridge* the right of any citizen of the United States to vote on account of race or color" (emphasis added). See *Allen* v. *State Board of Elections,* —— U. S. ——, 37 U. S. L. Week 4168, 73 (March 3, 1969).

[27] Although a random selection system accounted for a drop from an original representation of 37% on the jury lists to the 26% figure on the panel, the latter is determinative. Nothing in *Reynolds* indicates that states have the right by a random selection process to dilute votes. Even though that same process may at some future time result in a higher proportional representation, *Reynolds,* does not stand for the proposition that occasional vote dilutions are more constitutional than unvarying ones.

[28] Diminishment of the effectiveness of Negro votes by use of the gerrymander was condemned in *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960) while *Colegrove* v. *Green,* 328 U. S. 549 (1946) still appeared to prohibit judicial intervention in disputes alleging non-racial vote dilutions. Mr. Justice Frankfurter, writing ma-

These cases merely extend the long established willingness of the Court to overturn state political processes which discriminate against Negroes to devices which discriminate against persons who are not members of a racial minority. It is possible—indeed, it is exceedingly simple—to burden the franchise in a racially discriminatory manner while insuring that individuals, whether black or white, account for the same fractional share of a representative's constituency as every other voter. Thus, in *Sims* v. *Baggett*, the harm done by aggregating Negro and white counties was the diminution "of the Negro voting power" and the turning of "Negro majorities into minorities" 247 F. Supp. at 109; see also *Smith* v. *Paris*, 257 F. Supp. 901 (M. D. Ala. N. D. 1966) affirmed 386 F. 2d 979 (5th Cir. 1967); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Hadnott* v. *Amos*, —— U. S. ——, 37 U. S. L. Week 4256 (March 25, 1969). The national objective of eradicating voting discriminations against Negroes is an affirmative and specific constitutional pledge which antedates "one man, one vote" and is in no sense limited by it, as demonstrated by the fact that reapportionment law is limited to a defined class of elections, *Sailors* v. *Board of Education of Kent County*, 387 U. S. 105 (1967) while constitutional prohibitions of racial discrimination include "any [election] . . . in which public issues are decided or public officials selected," *Terry* v. *Adams*, 345 U. S. 461, 468 (1953) (Mr. Justice Black

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jority opinions in both, found no inconsistency between the two results, for it was almost 100 years ago that the Fifteenth Amendment established as national policy the doctrine that the right of Negroes not to be denied the franchise could not be "indirectly denied." *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944). See also *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Davis* v. *Schnell*, 336 U. S. 933 (1949).

concurring); *Hadnott* v. *Amos*, —— U. S. ——, 37 U. S. L. Week 4256 (March 25, 1969).[29]

In Taliaferro County, the method for selection of school board members prevents Negroes from effectively influencing the choice of officials whose decisions critically affect their lives and those of their children. The effect of the system of selection is to render Negroes a minority of

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[29] All three Civil War Amendments had as their central purpose the eradication of the last vestiges of slavery. See *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 682, n. 3 (1966) (dissenting opinion of Mr. Justice Harlan); *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948); *Slaughter House Cases*, 83 U. S. 36, 81 (1873). Because the "peculiar institution" was ground so firmly in the Negro's political subordination to whites, constructions of the Fifteenth Amendment have often recognized the right of Negroes to more than abstract voting privileges, and cases such as *Gomillion* v. *Lightfoot, supra; Terry* v. *Adams, supra; Lane* v. *Wilson, supra;* see also *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1948) all stand for the proposition that possession of the right to vote by Negroes is meaningless unless that right can be effectively used to gain a share of influence over the administration of vital community affairs. As stated in *Rice, supra*, at 165 F. 2d at 393 (cited with approval in *Terry, supra*, at 345 U. S. 466):

> no election machinery can be upheld if its purpose or effect is to deny to the Negro, on account of his race or color, *any effective voice in the government* of his county or the state or community where he lives (emphasis added).

This Court has recently held that burdens upon the ability of Negro candidates to be elected violate the Fifteenth Amendment because they deprive Negro voters of the right "to cast their votes effectively," *Hadnott* v. *Amos*, 37 LW 4256, 57 (1969). Thus, the Civil War Amendments are concerned with more than the simple abstract right to vote. The protection of voting is one means toward the achievement of what is necessarily the larger goal of preserving the ability of Negroes to engage the political process effectively in the protection and establishment of their freedom. Votes alone are insignificant unless they are permitted to work toward that objective, and dilutions are to be measured not merely by their effect to diminish the weight of votes, but by their effect to dilute the capacity of those votes to achieve their underlying objective, namely the eradication of the remnants of slavery.

those who select board members, thus jeopardizing their right to a desegregated school system, and conferring control of the schools on those who have no interest in educational quality, and whose hostility to Negroes in the county is a matter of record. The evil is not diminished because *all* Negroes have not been precluded from participation in the selection process. "(D)ilution of Negro voting power . . . is just as discriminatory as complete disfranchisement or total segregation." *Sims* v. *Baggett,* 247 F. Supp. 96, 109 (M. D. Ala. 1965). Nor is the injury to appellants lessened by the fact that a Negro was finally put on the school board after the first hearing in this cause. The evidence suggests that this was a token appointment by the grand jury under pressure of this lawsuit. The selection was without public notice, contrary to state law, and there was evidence that the person chosen was infirm, and not representative of the Negro community, see *supra* pp. 21, 22. In any case, the essence of appellants' claim is that they, and the class they represent, are limited in their power of *choosing* board members; that claim is in no way weakened by the fact that the school board *might* have appointed someone who also *might* have been chosen if the Negro community had the electoral power to which it is entitled. To paraphrase *Gomillion* v. *Lightfoot,* 364 U. S. 339 (1960) the inescapable effect of this long established scheme is to despoil Negro citizens, and only them, of their right to participate meaningfully in the selection of school board members.

Where Negroes have been deprived of their political rights the remedy has been invalidation of the discriminatory features of the system, e.g., *Lane* v. *Wilson, supra; Smith* v. *Allwright, supra.* Where a vague delegation of

power has been the mechanism involved, the delegation has been abolished, *Louisiana* v. *U. S., supra.* In their complaint, appellants also sought appointment of a receiver to operate the school system until a constitutional system of selecting board members could be instituted. In addition, the district court might have appropriately restricted control of the schools to Negro parents until whites demonstrated the kind of good faith which would render their participation no longer a danger to Negroes, say by reversing the withdrawal of their children from the system. The district court erred fundamentally, and, misconceived its function, in not adopting one of the available remedies which would eliminate the diminution of the franchise worked by the grand jury selection system.

Federal equity courts have broad power to mold their remedies and adapt relief to the circumstances and needs of particular cases. The test of the propriety of such measures is whether remedial action reasonably tends to dissipate the effects of the condemned actions and to prevent their continuance, *United States* v. *National Lead Co.*, 332 U. S. 319 (1947). Where a corporation, for example, has acquired unlawful monopoly power which would continue to operate as long as the corporation retained its present form, effectuation of the Sherman Antitrust Act has been held even to require the complete dissolution of corporate relationships. *United States* v. *Standard Oil Co.*, 221 U. S. 1 (1910); *Schine Chain Theatres* v. *United States*, 334 U. S. 110 (1948). Compare *N. L. R. B.* v. *Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241, 250 (1939); *Louisiana* v. *United States*, 380 U. S. at 154 (1965). Numerous decisions establish that the federal courts construe their power and duties in supervising the dis-

establishment of racial discrimination to require as effective relief as in the antitrust area.[30] So in *Griffin* v. *School Board of Prince Edward County, Va.*, 377 U. S. 218 (1964) this Court ordered a public school system which had been closed to avoid desegregation to be reopened. See also *Green* v. *New Kent County Board of Education*, 391 U. S. 430, 438, n. 4 (1968).

In this case the deprivation of political power through the layers of discretion authorized by the statutory selection scheme—from appointment of jury commissioners by a judge elected by voters of six counties to grand jury selection—powerfully affects "matters that intimately touch the daily lives of citizens," *Terry* v. *Adams*, 345 U. S. 461 (1953).[31] The proper education of their children has

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[30] E.g., *Carr* v. *Montgomery County (Ala.) Board of Education*, 253 F. Supp. 306 (M. D. Ala. 1966); *Dowell* v. *School Board of Oklahoma City*, 244 F. Supp. 971 (W. D. Okla., 1965) aff'd 375 F. 2d 158 (10th Cir., 1967), cert. den. 387 U. S. 931 (1967); *United States* v. *Logue*, 344 F. 2d 290 (5th Cir. 1965); *Board of Public Instruction of Duval Co., Fla.* v. *Braxton*, 326 F. 2d 616, 630 (5th Cir., 1964); *Wheeler* v. *Durham City Board of Education*, 346 F. 2d 768 (4th Cir., 1965); *Kelly* v. *Altheimer*, 378 F. 2d 483 (8th Cir., 1967); *United States* v. *Scarborough*, 348 F. 2d 168 (5th Cir. 1965).

[31] Powerlessness to affect the fate of their children was one of the most characteristic—and one of the most destructive—aspects of Negro slavery. Yet, today in Taliaferro County, not only are Negro children trapped in a school system which keeps them in racial isolation, but the parents of those children are prohibited from influencing the administration of the schools. Negro parents are kept from attending board meetings, they cannot observe their children in class and they cannot even freely form a parents-teachers association, see pp. 12-14, *supra* (A. 188-190, 206-07, 210-211, 225, 229). Negro children do not enjoy an integrated education in Taliaferro largely because three years ago a scheme was devised enabling white students to avoid attending integrated schools. School board participation in this conspiracy was so well established that in 1965 the district court felt constrained to remove the school system from board control and place it in re-

been recognized time and again as of crucial importance to the Negro race since *Brown* v. *Board of Education*, 347 U. S. 483 (1954). That interest cannot be adequately protected within the context of a structure which is subject to total domination by county whites who have continually and consistently shown themselves antagonistic to the interests and rights of Negroes. Only three years ago white resistance to integration of the schools was so great as to necessitate a federal court to order placement of the school system in receivership. Since the termination of that receivership no change in white community sentiment has been manifested. There is no evidence in the record of any significant attempt by that community, or its school board, to reverse the exodus of white students from the public schools. The school board even refuses to listen to the grievances of Negro parents whose children do attend

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ceivership. That receivership was terminated three months later with the expectation that the board would "resume the operation of a complete school system for 1966-67." The return of the schools to board control was "so that necessary plans for operating the school system in 1966-67 may be made." It was further noted that "the dual school system has been abolished for 1966-67." *Turner* v. *Goolsby*, 255 F. Supp. 724, 734 (S. D. Ga. 1965; supp. opinion 1966). The court clearly expected that the board was prepared to administer an integrated system but the board has not fulfilled that expectation. No board member has a child in the public schools (A. 23, 47). Nor has the board made any effective effort to induce a single white teacher or child back into the system (A. 357-59). In short, with regard to the education of their children, Taliaferro Negroes are in a position quite analogous to a pre-Civil War characterization of slaves as persons who were considered to be:

> A subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority and had no rights or privileges but such as those who held the power, and the government might choose to grant them. *Dred Scott* v. *Sanford*, 19 How. 399, 404-05, 60 U. S. 393, 404-405 (1857).

the schools (*supra*, pp. 12-14). In such circumstances, the Georgia scheme for selecting school board members operates in this county to deprive appellants of rights guaranteed by the Constitution. Until the state provides a system of selecting board members which does not unconstitutionally dilute the votes of Negroes, the district court is obliged to fashion a remedy to ensure that those who control the school system fairly represent the interests of Negroes.

III.

Georgia's Prohibition of Membership on County Boards of Education to Non-Freeholders Violates the Fourteenth Amendment.

By statute and constitutional provision, Georgia restricts membership on those county boards of education which are selected by a county grand jury to "five freeholders"—persons who hold title real property in the county,[32] Ga. Code Ann. §2-6801, Art. VIII, §V, para. I of the Constitution of 1945;[33] Ga. Code Ann. §§32-902, 902.1.

The court below rejected appellants' contention that by prohibiting those who did not own real property from school board membership Georgia had violated the Equal

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[32] A freehold is a generic term which describes "any estate . . . existing in, or arising from" real property, 28 Am. Jur. 2d, Estates §8. As defined in Black's Law Dictionary a freeholder is "one having title to realty" (4th Ed. 1957) p. 793.

[33] The Georgia Constitution states:

> The Grand Jury of each county shall select from the citizens of their respective counties five freeholders, who shall constitute the County Board of Education. Ga. Code Ann., §2-6801.

Protection Clause of the Fourteenth Amendment. The court did not decide what valid state interest, if any, this prohibition served. It merely concluded that this unequal treatment to non-freeholders did not amount to invidious discrimination:

> There was no evidence to indicate that such a qualification resulted in any invidious discrimination against any particular segment of the community, based on race or otherwise (A. 403).

This language should not be understood as a finding by the district court that appellants lack standing, for the court granted, and appellees did not oppose, the intervention of a non-freeholder, a father of six school children, who plainly possessed requisite standing to challenge a statute which prohibited him from serving on the county school board, *Bond* v. *Floyd*, 385 U. S. 116 (1966); *Baker* v. *Carr*, 369 U. S. 186 (1962). The district court permitted intervention (A. 72, 73) for the express purpose of conferring standing and as Judge Bell put it: "... to make certain that the Court will reach the merits of the claim that an application based on freeholders is unconstitutional" (A. 370-71).

Numerous decisions of this Court, however, stand for the substantive proposition apparently rejected by the district court that the poor form a class protected by the Equal Protection Clause against state legislation which discriminates on the basis of wealth,[34] and *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966) makes plain that the Equal Protection Clause prohibits discriminatory treatment of the poor in the political arena.

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[34] E.g., *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Smith* v. *Bennett*, 365 U. S. 708 (1961).

It is also established that the right to seek office as well as the right to vote may not be infringed on the basis of invidious discrimination. *Bond* v. *Floyd,* 385 U. S. 116 (1966); *Anderson* v. *Martin,* 375 U. S. 399, 401-402 (1964). The "right to choose, secured by the Constitution," *United States* v. *Classic,* 313 U. S. 299, 315 (1943) surely encompasses not only the casting of ballots but the right to appear on those ballots as a candidate, subject only to such rational requirements for candidacy consistent with the Equal Protection Clause as the States may prescribe. Participation in the electoral process necessarily includes the right to seek office. In *Bond* v. *Floyd, supra* at 385 U. S. 130, Georgia conceded that "if a State Legislature excluded a legislator on racial or other clearly unconstitutional grounds, the federal (or state) judiciary would be justified in testing the exclusion by federal constitutional standards."

On its face, the Georgia freehold qualification for school board membership operates as an unconstitutional denial of equal protection against the poor and non-landholders:

> For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned. (*Harper, supra,* 383 U. S. at 670.)

In fact, the requirement that one be a freeholder is so much more substantial than the $1.50 poll tax which the Court struck down in *Harper* that it emphasizes the disfranchisement in this case.[35] That Georgia's constitutional and

[35] Decisions in two recent cases construe *Harper* to compel the demise of financial restraints on enjoyment of political rights. Significantly, both cases dealt with the barrier involved in the in-

statutory limitation on the right to serve as a school board member to "five freeholders" is in violation of constitutional requirements is also supported by the principle that the standards of the Equal Protection Clause are the more exactingly applied where the franchise is concerned. When the State attempts to restrict a fundamental right it can do so only on the showing of a "compelling interest." *Sherbert* v. *Verner*, 374 U. S. 398, 405 (1963); *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 438 (1963); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S.

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stant case—the antiquated condition of a right on the ownership of real property. In *Pierce* v. *Ossining*, 292 F. Supp. 113 (S. D. N. Y. 1968) the property requirement struck down was a prerequisite to voting in a town election. In *Landes* v. *Town of Hempstead*, 231 N. E. 2d 120, 20 N. Y. 2d 417, 284 N. Y. S. 2d 417 (1967), the New York Court of Appeals overruled a 1937 decision and rejected a property requirement as a limitation on the right to hold office. The New York Court of Appeals found that "it is impossible . . . to find any rational connection between qualifications for administering town affairs and ownership of real property" (20 N. Y. 2d at 421).

Two other cases reach a different result. *Cipriano* v. *City of Houma*, upheld a restriction that property taxpayers only vote on a resolution authorizing issuance of utility revenue bonds, 286 F. Supp. 823 (E. D. La. 1968) probable jurisdiction noted 37 U. S. L. Week 3275 (Jan. 14, 1969) O. T. 1968, No. 705. *Kramer* v. *Union Free School District No. 15*, O. T. 1968, No. 258, argued January 6, 1969, upheld a requirement that voters in a school election be either real property owners, their spouses, school district lessees (but not their spouses) or parents or guardians of children attending district schools, 282 F. Supp. 70 (E. D. N. Y. 1968); see also 259 F. Supp. 164 (E. D. N. Y. 1966). While appellants believe the views of the dissenting judges in these two cases are persuasive, these decisions in no way affect the question before the Court here. In *Kramer*, instead of the broad restriction to freeholders authorized by Georgia, New York law permitted parents, guardians, and lessees to vote, as well as those who own taxable real property and their spouses. In *Houma*, the vote did not concern public schools but only the relatively narrow question of whether to issue utility revenue bonds, a decision which also was subject to approval of the generally elected municipal government body.

624, 644 (1943); *Harper*, *supra* at 383 U. S. 668. In order to satisfy the requirement of "compelling interest" the state must demonstrate *all* of the following: (1) That the restriction imposed rationally relates to legitimate governmental objectives sought; (2) that the benefit to the public of those objectives outweighs the impairment of the constitutional right and that (3) no alternative means less subversive of the constitutional right are available. See *Kenyatton* v. *Board of Regents*, 385 U. S. 589 (1967); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *N. A. A. C. P.* v. *Alabama*, 377 U. S. 288 (1964); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Sherbert* v. *Verner*, *supra*; *Edwards* v. *South Carolina*, 372 U. S. 229, 238 (1963); *N. A. A. C. P.* v. *Button*, *supra*, at 433; *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960); *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945); *Schneider* v. *State*, 308 U. S. 147, 161 (1939); *Symposium on the Griswold Case and the Right of Privacy*, 64 Mich. L. Rev. 197 (1965).

The freeholder limitation is in no way supported by such a justification. The purpose of the provision is not expressed, but in the nineteenth century, when it was enacted, it was thought by many that only owners of real property were sufficiently concerned about government to exercise the duties of office. Whatever the validity of this conclusion in the past, it is plain that today one's interest in, or capacity for, public affairs does not depend on whether he is a landlord or a tenant. As Judge Weinstein has put it:

> Some premises are no longer constitutionally permissible and legal syllogisms which embody them must be rejected. One constitutionally unacceptable hypothesis is that people owning rights to real property are more likely than citizens generally to exercise

> their vote responsibly. Thus, a local policy based on the assumption that owners of property rights are particularly interested in school elections cannot justify denying the right to vote to other morally and intellectually qualified adults who meet residence requirements. *Kramer* v. *Union Free School Dist. No. 15*, 282 F. Supp. 70, 80 (E. D. N. Y. 1968) (dissenting opinion).

In short, the idea that only persons who hold real property are capable of holding public office reflects an obsolete and repudiated view of what constitutes equal protection.[36] *Harper* v. *Virginia State Board of Elections*, *supra*; *Landes* v. *Town of North Hempstead*, *supra*; cf. *McLaughlin* v. *Florida*, 379 U. S. 184, 190 (1964).

Nor can the freeholder requirement be rationally justified by a desire to limit service on boards which set tax rates to those who pay taxes, see *State ex rel. Mitchell* v. *Heath*, 345 Mo. 226, 132 S. W. 2d 1001, 1004 (1939)—even if one makes the dubious assumption that the public interest in education could be totally displaced by the taxpayer's interest in the use of funds that once were his.[37] In Georgia, the county school board has no direct taxing power but may only recommend a tax rate to county authorities (Ga. Code Ann. §§32-1118, 1127) and the property which is potentially subject to taxation for school purposes is not

[36] Ownership of land has even less rational relationship to qualifications for the office of school board member than other offices (town supervisor, county commissioner, etc.) because the school board is concerned with a delimited set of concerns, none of which has any relation to property holding.

[37] It should be noted that neither of the two state policies which Mr. Justice Black, dissenting, found would support the poll tax in *Harper*, 383 U. S. at 674 are available to justify the freeholder requirement.

limited to that of individual freeholders, Ga. Code Ann. §32-1116. Moreover, the Taliaferro school system raises but a small proportion of funds raised by ad valorem taxes ($39,000 out of a total budget of $267,611) (A. 49). The overwhelming majority of the budget is received from the state and federal governments.

Nor need Georgia limit board membership to five freeholders to achieve even the questionable benefits one might suppose for the freeholder requirement—as witnessed by the fact that a non-freeholder may apparently be appointed to a school board in those counties which have abandoned the grand jury selection device, see *infra* pp. 1a-2a. At any rate, other options are available to the state which do not involve needless denial of participation in organs of government which critically affect the public welfare. If it is the voice of the freeholder which the state wishes to have considered, school boards could be required to seek the written opinion of one or more freeholders concerning anticipated land purchases or transfers prior to making any decision thereon. Or school boards might be directed by statute to obtain legal counsel concerning any land transactions. But any claimed benefits of the present freeholder requirement are clearly outweighed by the extent to which parents of school children and other non-landed citizens generally are totally denied access to what may be the most important unit of local government and most available outlet for community political expression. Cf. *Kramer* v. *Union Free School Dist. No. 15, supra*, 282 F. Supp. at 76-78 (dissenting opinion).

Nothing appellants urge detracts in the least from the power of the states to assure that competent persons administer the public schools. In *Abington School District*

v. *Schempp*, 374 U. S. 203 (1963) for example, this Court recognized the special stake parents have in the proper administration of their schools by granting them standing to contest unconstitutional practices taking place in them. Georgia law does not, however, recognize a group with a special concern for the schools by limiting board membership to freeholders; on the contrary, it vests membership in a group with no such special concern. Where an interest as vital as the operation and management of the schools is involved, a state violates the Equal Protection Clause by restricting control of its educational establishment to those who own a particular class of property.

CONCLUSION

WHEREFORE, appellants pray that the judgment of the court below be reversed in so far as it denies declaratory and injunctive relief.

Respectfully submitted,

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